United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1259

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1259

UNITED STATES OF AMERICA,

Appellee,

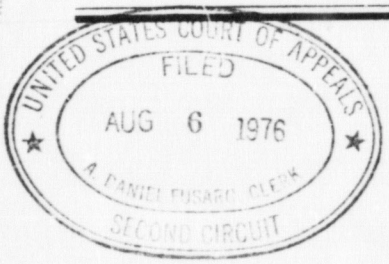
—against—

JOSEPH DiGISO, ANTHONY CONTRERAS
and ANDERW BERRADA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANT ANDREW BERRADA



ROSENBERG, ROSENBERG,
EHRLICH & SCHUMINSKY,
Attorneys for appellant
Andrew Berrada
200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

MARC A. ROSENBERG,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1259

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH DIGISO, ANTHONY CONTRERAS and ANDREW BERRADA,

Defendants-Appellants.

BRIEF ON BEHALF OF APPELLANT ANDREW BERRADA

Preliminary Statement

Appellant Andrew Berrada appeals from a judgment of conviction entered against him on June 8, 1976 after a jury trial before the Hon. Thomas C. Platt in the United States District Court for the Eastern District of New York. Berrada was sentenced to seven years' imprisonment upon each of two counts (counts 3, 4) of the indictment, and five year imprisonment upon count 5 of the indictment, the terms of imprisonment to run concurrently and pursuant to 18 U.S.C. Section 4205(b)(2). Berrada was acquitted on the first two counts of the indictment.

Indictment 75 Cr. 720, was filed on September 29, 1975, in the United States District Court for the Eastern

District of New York and contained five counts. Counts 1 and 3 charged violations of Title 18 United States Code, Section 659 (Interstate Theft); Counts 2 and 4 charged violations of Title 18 United States Code Section 659 (Unlawful Receipt or Possession). Each of counts 1 through 4 also includes charges of violations of 18 United States Code Section 2 (Aiding and Abetting). Count 5 charges violation of Title 18 United States Code Section 371—Conspiracy to engage in stealing, receiving and possession of four shipments of goods while moving in interstate commerce. Counts 1 and 2 named defendants Joseph DiGiso, Anthony Contreras and Andrew Berrada. Counts 3 and 4 named defendants Joseph DiGisco, Andrew Berrada and Robert Dominici. Count 5 named all four defendants: Joseph DiGiso, Anthony Contreras, Andrew Berrada, Robert Dominici and the unindicted co-conspirators Thomas Tavolacci and one, Albert Strouse.

The dispositions of the defendants named in the indictment, other than Berrada were as follows:

The Convicted Defendants

Joseph DiGiso was convicted on all counts and was sentenced to eight years upon each of counts 1, 2, 3 and 4, and further sentenced to five years incarceration on count 5, each sentence to be served concurrently with the others, and all pursuant to 18 U.S.C. Section 4205 (b) (2).

Anthony Contreras was convicted on counts 1, 2 and 5, was sentenced to five years imprisonment on each of said three counts, all to run concurrently and pursuant to 18 U.S.C. Section 4205 (b) (2).

The Acquitted Defendants

Robert Dominici, having been charged under counts 3, 4, and 5, was acquitted on all said counts.

Questions Presented For Review

1. Did the Trial Court commit error by allowing into evidence the witness Brown's photographic identification of defendant Berrada?

2. Did the evidence at trial disclose proof of multiple conspiracies rather than a single conspiracy and consequently was there a variance mandating the reversal of appellant Berrada's conviction on the conspiracy count?

3. Was the Trial Court in error in its charge to the jury as to multiple conspiracies?

4. Did the prosecution as to defendant Berrada fail to establish his guilt beyond a reasonable doubt in counts 3, 4 and 5 of the indictment?

Statement of the Case

A. Introduction

The trial of this case consisted of testimony of numerous Government witnesses, including unindicted co-conspirator Thomas Tavolacci as to two "truck hijackings" contained in counts 1 and 3 of the indictment, the unlawful receipt and/or possession of the fruits of said larcenies as contained in counts 2 and 4 of the indictment. Additionally, Tavolacci testified as to the events charged in count 5 of the indictment (conspiracy) and, more par-

ticularly, his testimony as to the conspiracy count, was directed at approximately four shipments of goods which had been stolen while moving as a part of interstate commerce. The dates involved in the four shipments were: 1. April 27, 1973, 2. May 7, 1973, 3. May 29, 1973, 4. June 28, 1973. The second shipment (May 7, 1973) and the fourth shipment (June 28, 1973) were also the foundation for all the substantive counts contained in the indictment. Berrada was acquitted by the trial jury on counts 1 and 2 of the indictment. The defendant Dominici was acquitted on all counts charged against him (counts 3, 4, 5).

B. The Prosecution's Case

The entire case against Berrada centered around the testimony of Thomas Tavolacci the Government's principal witness, who was a named but unindicted co-conspirator.

Tavolacci's testimony was that he is fifty-one years old, married, with four children, and that he is unemployed (p. 48). He told the F.B.I. that he had participated in thirty or forty hijackings (Tr. 102),* and in return for pleading guilty to one count of possession of stolen merchandise that he would be given immunity by the Government to all other crimes, providing he agreed to cooperate with the Government (Tr. 103). Tavolacci entered a plea of guilty with respect to possession of stolen merchandise and received a twenty-month sentence of incarceration and served nine and one-half months before being parolled (Tr. 101). Tavolacci stated that previous to his arrest in July of 1973, that he was arrested in New Jersey for untaxed cigarettes (Tr. 106);

---

* All page references are to the pagmentation of the transcript in the record on appeal. Appellant Berrada fully adopts the appendix of appellant Contreras.

that he then posted bail and never returned (Tr. 107). He testified that he was a hijacker since the year 1967, made approximately fifty thousand dollars from hijacking (Tr. 110), and later testified that he made approximately one hundred fifty thousand dollars from hijacking (Tr. 209); that since 1967 he was living on and off with his girl friend, one Dorothy Graziano (Tr. 171); that he is presently receiving nine hundred and some odd dollars a month from the Justice Department (Tr. 121); that he stole from his partners in crime (Tr. 129); that when he did work for a legitimate business that he stole from it (Tr. 136, 137, 138). He further stated that he robbed two or three jewelry stores; that he bought a case of stolen guns from a hijacker in 1968 (Tr. 149); he was a stick-up man (Tr. 150); held up a night deposit in front of a bank (Tr. 151); and that before reaching his understanding with the Government that he thought he was facing fifty years (imprisonment) (Tr. 158). Tavolacci testified that the sole reason for making a deal with the Government was that he didn't want to go to jail (Tr. 223); and that as a matter of fact he would do anything to stay out of jail (Tr. 224).

The Government through Tavolacci and other witnesses submitted evidence in part as follows:

That on April 27, 1973, at or about 3:00 A.M., Thomas Tavolacci, appellants Joseph DiGiso and Anthony Contreras and Albert Strouss met at the home of Dorothy Graziano, located on East 3rd Street, Brooklyn, New York (Tr. 52-55); that the meeting had been arranged earlier for the purpose of assembling to look for a truck to hijack (Tr. 56-57). From the Graziano house the men proceeded in two cars, a 1969 blue Chevelle and a rental car, toward the Verrazano Bridge. They parked in the vicinity of 65th Street so they could see the Brooklyn-Queens Expressway and waited for a truck. As they

waited a United Merchants truck, enroute from South Carolina carrying textile piece goods, proceeded slowly over the Verrazano Bridge toward the Brooklyn-Queens Expressway (Tr. 447, 455).* The truck entered the Brooklyn-Queens Expressway and passed by 65th Street where it was seen by the four men. After seeing the truck they entered the Brooklyn-Queens Expressway and followed it to Church Street trucking (Tr. 447) at Church and Worth Streets (Tr. 60).

The truck backed into the building there, and at that point Tavolacci approached it, pulled out a gun and told the drivers, Hoyt Shead and Guy L. Snell, that he was taking the truck (Tr. 61, 448-449). The drivers were placed in the rear of the Chevelle which was being operated by Contreras. The two drivers, Tavolacci and Contreras then left the truck and drove through the Brooklyn Battery Tunnel on to the Southern State Parkway (Tr. 62, 451). They drove as far as Exit 34, then turned around and proceeded back into Brooklyn, where the drivers were released. During the ride Tavolacci observed a ship coming into New York Harbor and commented about it (Tr. 452). The truckdriver Snell, testified that Tavolacci and Contreras mentioned a man by the name of Andrew and at one point Tavolacci allegedly referred to Contreras as Tony (Tr. 453-454).** Aside from this incompetent testimony, there was nothing in the record to connect the appellant Berrada with the April 27, 1973 hijacking.

---

* Guy L. Snell, driver, testified that the hijackers commented that the truck must have been carrying a heavy cargo because it slowed as it climbed the Verrazano Bridge from the New Jersey side.

** Snell seeing only the back of the head and a one-quarter profile was not able to identify Contreras as the driver of the car (454).

While the druck drivers were being driven around by Tavolacci and Contreras, the truck was taken to Harris' Department Store, in Montclair, New Jersey (Tr. 65), and the load delivered to one, Bernard Mass. Prior to the delivery Mass had been contacted by a person named either Jim or Jack, in reference to the buying of dresses and pants (Tr. 362).*

The truck arrived at the department store at about 8:30 A.M., and Mass was told by the driver that the load was for him. Mass had been expecting men's pants but accepted the load of piece goods anyway. Strouss assisted Mass and the driver in unloading the truck** (Tr. 375-379). After the delivery had been made Mass talked to Jim or Jack and was informed that the wrong shipment had been delivered (Tr. 380). Mass said he did not want the material but later agreed to purchase it (Tr. 382). Thereafter Mass gave the driver who made the delivery a partial payment (Tr. 383) and arranged for his father, Emanuel Mass, to pay the balance (Tr. 384-85).*** Several weeks after the delivery Mass received a telephone call from DiGiso and as a result they met. DiGiso offered to sell Mass a quantity of men's work jackets but Mass declined the offer because he didn't deal in them.****

Counts one and two of the indictment revolved around the alleged May 7, 1973 occurences. Berrada was ac-

---

* Jim or Jack had been referred to Mass by one, Ray Barske (Tr. 362, 882-885). Jim or Jack was not appellant DiGiso.

** DiGiso did not participate in the delivery and unloading of the truck.

*** Tavolacci testified that he accompanied DiGiso to the Harris Department Store several days later when DiGiso collected part of the money (Tr. 66-67). Mass never identified DiGiso as a person to whom money was paid and, in fact, said that if Tavolacci had said that DiGiso collected some of the money that Tavolacci was either mistaken or lying (Tr. 409-410).

**** An objection to this testimony was overruled.

quitted of these counts; however, Tavolacci's testimony was that on May 7, 1973, a meeting was held at the Graziano home (Tr. 71). Present were Tavolacci, DiGiso, Contreras and Andrew Berrada (Tr. 72). This meeting also had been prearranged for the purpose of going out to hijack a truck (Tr. 71). All four men left in the Chevelle (Tr. 73) and drove around for a few hours looking for a truck (Tr. 72). As they were ready to give up they saw a Cooper Motor Line's truck parked on Hamilton Avenue in Brooklyn (Tr. 72). The truck, driven by one, Sam Brown, who was six feet seven inches tall, had come from South Carolina. As Mr. Brown was returning to his truck after asking directions he was approached by Tavolacci and Contreras (Tr. 73, 563-564).* They then drove away, and DiGiso and Berrada took the truck (Tr. 74).

Brown was driven around for three and one half hours and then released (Tr. 568). During the ride Talvalucci referred to Contreras as "Tony" (Tr. 568). Later that day DiGiso told Talvalucci that the load could not be sold and had been abandoned (Tr. 74-75).

In the early morning hours of May 29, 1973, Talvalucci, Strouss, DiGiso and Berrada met at Dorothy Graziano's house (Tr. 76). They left shortly thereafter in two cars, the blue Chevelle and Strouss's car, and drove to Manhattan in the vicinity of Canal Street and Broadway (Tr. 77)). There at the Harry Semmell Company was a Cooper Motor Lines truck which had

---

* Brown described Tavolacci as having sandy red hair, weighing 185-200 pounds, being 5 foot 10 inches-5 foot 11 inches in height, and thirty-six to forty-two years old, with a rough complexion. He described Contreras as being 5 foot 6 inches tall and having black hair graying at the sides. Brown never saw his face because of sunglasses that he was wearing (564-565, 589). Brown was not able to identify Contreras as being one of the hijackers.

just arrived from South Carolina with drivers Sam Brown and Ralph Owens (Tr. 569-570). Tavolacci approached the truck and at gun point ordered both drivers out (Tr. 78, 571-572). He then escorted the driver to the blue Chevelle which Berrada was driving and placed them both in the back seat (Tr. 78, 573). They drove away, and about three and one-half to four hours later the drivers were released.*

While the truck drivers were being driven around DiGiso and Strouss took the truck. Thereafter DiGiso arranged to sell the contents of the truck, yarn, to one Robert Tribulsi, at Vanguard Knits, Brooklyn, New York, for seventy-five cents a pound (Tr. 280). The yarn was delivered a day or two later (Tr. 283), and thereafter Tribulsi paid DiGiso three thousand dollars (Tr. 284).**

Several weeks later Tavolacci and Berrada decided that Robert Dominici would participate in the next hijacking instead of Contreras or Strouss (Tr. 86).

Thereafter and on or about June 28, 1973, Tavolacci, Berrada, DiGiso and Dominici met at the Graziano residence and then left to find a truck to hijack. They drove to the area of the Verrazano Bridge, where they spotted a Carolina Mills truck driven by one, Bill Eapes, and one, Charlie Hartzoge (Tr. 87). Tavolacci and the

---

* At the trial Sam Brown was unable to make an in court identification of any of the defendants as being participants in either of the hijackings (Tr. 575). Because of this he was permitted to testify that after the hijackings he selected from an array of photographs Contreras and Berrada as both having eyes similar to the eyes of hijacker No. 2 in the second hijacking, May 28. This was the only basis for his selection.

** Tribulsi testified that on one occasion Berrada accompanied DiGiso when he went to Vanguard Knits (Tr. 289).

others followed the truck to the Nassau Tape and Webbing Company on Flatbush Avenue in Brooklyn (Tr. 87, 627, 633). As the truck stopped to make a delivery (Tr. 628), Tavolacci went up to the truck and ordered the drivers out and placed them in the rear of the blue Chevelle which Dominici was driving (Tr. 88, 628).* The drivers were told to keep their eyes closed, and they were driven around until released some four hours later.

A few days later the contents of the truck, which was another quantity of yarn, was delivered to Vanguard Knits where it was stored (Tr. 288) because it was not readily saleable since it was an unpopular type (Tr. 288).

About two weeks later, and on or about July 16, 1973, Tavolacci was arrested in connection with another case (Tr. 90). At the time of his arrest he was in the company of Contreras, and both of them together with DiGiso had just returned from an unsuccessful attempt to locate a truck to hijack (Tr. 99-100).**

In August, 1973, Tribulsi received a visit from Special Agent Colgan, of the Federal Bureau of Investigation, who was inquiring about hijacked yarn (Tr. 290). After receiving permission Agent Colgan searched the premises of Vanguard Knits and found nothing. A few days later Tribulsi destroyed the yarn that he was storing and told DiGiso about Agent Colgan's visit and

---

* Eaden and Hartzoge were unable to identify Dominici during the trial but did testify the driver of the car was big, about 250 pounds and had long black hair (Tr. 630, 635).

** The testimony of Tavolacci was permitted over objection, and its admissibility was limited to those defendants named as similar acts with reference to the substantive counts and as part of the proof with reference to the conspiracy count (Tr. 98).

the fact that he destroyed the yarn. He also indicated that he was frightened, and DiGiso told him not to worry. Agent Colgan returned again sometime later, and during a conversation with Tribulsi, Tribulsi told him that he wanted a lawyer (Tr. 301). Thereafter Tribulsi called DiGiso, and DiGiso again told him not to worry.

In 1975 after Tribulsi was subpoened before the Grand Jury he called DiGiso, and DiGiso told him that he was being given a hard time by the people and to say that he knew nothing (Tr. 301-305).

C. The Appellant Berrada

The evidence in this case is thoroughly devoid of any showing of Berrada's participation in the April 27th hijacking. His conviction on counts 3, 4 (May 29th events) is due in substantial part to the Trial Court's errors in allowing into evidence incompetent identifications. The Court's failure to correctly charge as to multiple conspiracy when viewed in light of the evidence adduced at trial mandates reversal of the conviction on the conspiracy count as well as counts 3 and 4.

POINT I

By allowing in evidence suggestive and improper photo identification, the trial court committed reversible error, warranting a new trial.

The case of *United States* v. *Simmons*, 390 U.S. 377, 88 S. Ct. 967 (1968), is the leading decision on the admissibility of prior, out of court, photo identifications.

In *Simmons*, *supra*, the Supreme Court set down guidelines that trial courts should follow in considering

the admissibility of such evidence. The incompetency of such evidence is clear, according to the High Court, "if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification".

The Supreme Court further cautioned that (88 S. Ct. at 971):

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained *only a brief glimpse of a criminal, or may have seen him under poor conditions.* Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, *there is some danger that the witness may make an incorrect identification.* This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single *such individual recurs or is in some way emphasized.* The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification (emphasis supplied)."

Although the witness Brown was in one car allegedly with Berrada for about three and one-half hours (Tr.

574), Brown admitted that he sat directly behind the driver (purportedly Berrada) (Tr. 597), and according to his testimony, he only saw the driver's face briefly; and did not consider it a good look at him (Tr. 598). This fact taken in conjunction with Brown's testimony that he was not shown photographs of the defendant until one year after the crime (Tr. 509), establishes the dangers warned of by Judge Friendly in *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912 (2d Cir. 1970). In the determination of a due process violation, Judge Friendly indicated that courts may inquire into external factors such as "the initial opportunity for observation" and "lapsed time between crime and confrontation".

The Supreme Court in *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967), stated that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it". Brown testified that he did not get a good look at the driver (Tr. 598) and was not shown photographs until a year after the hijacking (Tr. 509). Brown admitted on cross-examination that when he was shown certain photographs on two separate occasions there was only one photograph in the spread that had the one particular character trait that he attributed to the driver: "Italian eyes" (Tr. 600). Brown's testimony evidences the impropriety of the prior out of court identification, particularly when viewed with his inability to identify Berrada at trial as the driver (Tr. 573, 594-595):

> "Q. What did the second fellow look like? A. He had black hair. His eyes resembled a commercial with Andy Granatelli in it, definitely Italian. The eyes I guess you would say were the outstanding characteristic.
>
> Q. You don't recall ever seeing this fellow before? A. I don't recall seeing this fellow before.

Q. Do you recall anything else about the second fellow? A. Not an awful lot."

* * * * *

"Q. Who is Andy Granatelli? A. At the time he was executive or president of STP Corporation that had an awful lot of advertising on television and various magazines.

Q. And you saw his picture, too? A. Yeah.

Q. And his eyes looked like the eyes of the second man as well? A. Right."

* * * * *

"Q. You know other eyes that look like the second man and the pictures here, and Andy Granatelli? A. I do.

Q. In other words, you have seen many eyes that look like the eyes of the second man? A. That's correct."

Brown's entire basis for selecting the driver from the photographs submitted to him was the "Italian eyes" of Berrada. Brown, it must be remembered, misidentified Contreras as the man on the second hijacking (Tr. 542, 552-553, 579). Moreover, Brown stated the defendant Contreras never took off his sunglasses (Tr. 589). Consequently, Brown's admission that his selection of Berrada from the photographic display was really on the basis of "Italian eyes" (Tr. 581) and makes manifest the impropriety of the out of court identification. Brown, according to his testimony, covered the faces of all individuals displayed in the photographic spread, and selected Berrada on the basis of "Italian eyes" (Tr. 592). Brown stated that in his opinion only one of the pictures had the so-called "Italian eyes", and resultantly, the admission of the out of court identification at trial prejudiced the defendant to a serious

degree so as to deny him a fair trial. Brown was unable to make an in court identification (Tr. 515) of the defendant Berrada.

The Government argued that the out of court identification was admissible pursuant to Rule 801(d)(1)(c) of the Federal Rules of Evidence. Assuming arguendo that an out of court identification would be admissible, it is crystal clear that the circumstances surrounding the out of court photographic identification of Berrada, in view of Brown's inability to identify Berrada at trial, was not only prejudicial, but inadmissible even under Rule 801. See Advisory Committee notes. The photo identification in this case was so inadequate that its admission flies in the face of justice and served no purpose other than to prejudice the defendant in the minds of the jury.

POINT II

When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed.

In the case of *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), this Court issued a warning that by charging a single conspiracy, where the evidence adduced at trial disclosed multiple conspiracies, the Government may be unnecesarily exposing itself to reversal.

> "In view of the frequency with which the single conspiracy versus multiple conspiracies claim is being raised on appeals before this Court * * * we take this occasion to caution the government with respect to future prosecutions that it may be un-

> necessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we have had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants (506 F.2d at 1340-41)."

This warning was ignored as evidenced by this Court's recent opinion in *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975). In *Bertolotti*, this Court stated (at 154):

> "When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed."

In reversing the conviction in *Bertolotti* upon the ground that prejudicial multiple conspiracies were established, this Court further stated:

> "Our examination of the evidence reveals a sufficient basis for the jury to be satisfied beyond a reasonable doubt that each of the asserted transactions took place, but no evidence linking them to-

gether in a single overall conspiracy. [Citations omitted]. Indeed, the only common factor linking the transactions was the presence of Rossi and Coralluzzo. This type of nexus has never been held to be sufficient. [Citation omitted]. We find our description of the operation in *Miley* perfectly apt in the instant case. The operations centering around Rossi and Coralluzzo could hardly be attributed to any real organization, even a 'loosely knit' one. [Citation omitted.] There was no evidence to show that these two 'were conducting what could seriously be called a regular business on a steady basis.' The scope of the operation was defined only by Rossi's resourcefulness in devising new methods to make money.

"It is clear to us that the government has merely merged several conspiracies for the sake of convenience. [Citation omitted]."

The Government's merger of several conspiracies in the present case improperly and prejudicially subjected the appellant Berrada to a deluge of evidence with respect to the unrelated criminal conduct of other persons. The Government's key witness at trial was unindicted co-conspirator Thomas Tavolacci. Tavolacci testified as to two "truck hijackings" contained in counts 1 and 3 of the indictment, and the unlawful receipt and/or possession of the fruits of said larcenies as contained in counts 2 and 4 of the indictment. Additionally, Tavolacci testified as to the conspiracy charged in count 5 of the indictment and, more particularly, his testimony as to this count was directed at approximately four shipments of goods which had been stolen while moving as a part of interstate commerce. The indictment alleges the dates involved in the four shipments were: (1) April 27, 1973: (2) May 7, 1973; (3) May 29, 1973; (4) June 28, 1973. The second shipment (May 7, 1973) and the fourth shipment (June

28, 1973) were the foundation for all the substantive counts contained in the indictment. Berrada was acquitted by the trial jury on counts 1 and 2 of one indictment. The defendant Dominici was acquitted on all counts charged against him. The Government's key witnesses' testimony with respect to Dominici was not corroborated.

In large measure then, it is believed that the jury weighed Tavolacci's testimony most suspiciously and in the absence of any corroboration did refuse to convict. Berrada was *not* mentioned at all by Tavolacci as to the events surrounding the April 27, 1973 hijacking as charged solely in count 5. In fact, the Government failed to produce any evidence whatsoever as to Berrada's participation in the events surrounding the April 27, 1973 allegation. Taken in conjunction with his subsequent acquittal as to the charges concerning the May 7th allegations (counts 1, 2) and the Court's errors in allowing into evidence tainted photo identification of Berrada to corroborate Tavolacci's testimony of the May 29, 1973 and June 28, 1973 alleged hijacking all point to lack of evidence of a single conspiracy. The evidence was manifest that multiple conspiracies were included in count 5 of the indictment. So the Government in its failure to charge multiple conspiracies subjected the defendant (appellant) Berrada to a flood of extraneous and prejudicial testimony.

The variance of proof between the evidence at trial and the charges contained in the indictment was such as to deny appellant Berrada a fair trial.

POINT III

The trial court failed to properly charge the jury with respect to the multiple conspiracy issue.

In *United States* v. *Cohen*, 518 F.2d 727 (2d Cir. 1975), this Court reaffirmed the rule in this Circuit with respect to the multiple conspiracy charge that ought to be given to the jury:

> "The trial court also fully instructed the jury that they could *not convict* unless they found the defendants had been engaged in single conspiracy rather than engaged in separate or multiple conspiracies. Cohen objects that the court's instruction that '. . . if you find that the government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty' was an 'all or nothing' charge similar to the one found impermissible in *United States* v. *Kelly*, 349 F.2d 720, 757-758 (2d Cir. 1965), cert. den. 384 U.S. 947 (1966). Such instructions have been held proper in recent cases. See, e.g., *United States* v. *Sperling*, 506 F.2d 1323, 1341 (2d Cir. 1974); *United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973). *** (518 F.2d 727 at 735) [Emphasis added]."

In *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), the charge of the trial court was found to be proper regarding multiple conspiracies in that Judge Pollack "specifically charged that if the government 'has failed to prove the existence of only on conspiracy, you must find the defendants not guilty'."

In the present case, the Court's charge is devoid of such instruction to the jury. It completely neglected to advise the jury as to the fact that if they found that

separate conspiracies as to each individual hijacking or that all the hijackings were not connected, that they could acquit (Tr. 1090-1099), and defense counsel's objection to this fact went unheeded (Tr. 1118). In other words, the Court did not make the jury aware of the number and type of conspiracies that could have possibly existed as to the indictment. The charge as to multiple conspiracies by the trial court in the case at bar was obviously inadequate and necessarily incomprehensible to the jury:

> "Although the indictment charges a single conspiracy, it would be possible to find separate conspiracies, one relating to the willful combination and conspiracy to knowingly and intentionally and unlawfully take from motor trucks goods and materials of a value of $100 or more, which goods had been moving as a part of or constituting part of an interstate shipment of property, and the other conspiracy to knowingly and intentionally receive and possess such goods and material, the conspirators knowing the same to have been stolen.
>
> "Whether there was one conspiracy or two conspiracies, or no conspiracy at all is a fact for you to determine in accordance with these instructions. (Tr. 1099).

The Court's charge thoroughly negated the fact that if all of the activities specifically charged in the conspiracy count of the indictment are shown, in fact, to have been a conglomeration of separate conspiracies, then the jury is obliged to acquit.

This charge becomes even more important when we consider that the proof at trial was so insufficient as to

acquit the defendant on two of the substantive counts and even less satisfactory for the other alleged acts in the conspiracy. (See Statement of the Case and Point II, *supra.*)

In view of the utter failure of the Court's charge to properly instruct the jury as to the multiple conspiracy issue, the judgment of conviction must be reversed.

POINT IV

The judgment of convictions as to all counts should be reversed and dismissed.

In view of all the foregoing, it is submitted that the prosecution failed to prove the guilt of the defendant-appellant on the ground that the record at trial was barren of legally sufficient and competent evidence to demonstrate Berrada purported membership and participation in counts 3 and 4 as well as the conspiracy charge.

It is submitted that reasonable minds, as a matter of law and as a matter of rudimentary fairness, could not conclude that the evidence at trial was inconsistant with the hypothesis of defendant-appellant's innocence, and this Court should not, on the nature, quality, character, extent and sufficiency of the evidence, sustain or countenance the jury's finding of guilt "beyond a reasonable doubt". See *United States* v. *Freeman*, 498 F.2d 569 (2d Cir. 1974); *United States* v. *Black*, 497 F.2d 1039 (5th Cir. 1974).

This Court in *United States* v. *Freeman, supra*, stated that

> ". . . the test to be applied in reviewing the sufficiency of the evidence after a bench trial

> is the same as the one we have since adopted, United States v. Taylor, 464 F.2d 240 (2 Cir. 1972), overruling the *Costello* and *Tutino* line of cases, when the issue is the propriety of submission to a jury. Adapting Judge Prettyman's formulation in Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, 232-233 (D.C. Cir. 1947), cert. denied, 331 U.S. 837, 67 S. Ct. 1511, 91 L. F. 2d 1850 (1947), with respect to jury trials, which we endorsed in *Taylor*, the test here is whether upon the evidence, giving full play to the right of the trial judge to determine credibility, weigh the evidence, and draw justifiable inferences of fact, 'a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' This does not alter the principle that after a conviction we consider the evidence 'in the view most favorable to the government'; it simply raises the level that the evidence so considered must meet (498 F.2d at 571)."

The trial judge, it is respectfully asserted, should not have submitted defendant-appellant's case, in the first instance, to the jury.

POINT V

The appellant Berrada adopts all relevant points raised by the co-appellants.

CONCLUSION

For all the above reasons, the judgment of conviction should be reversed and the indictment should be dismissed. In the alternative, the appellant should be granted a new trial.

Respectfully submitted,

ROSENBERG, ROSENBERG,
EHRLICH & SCHUMINSKY,
Attorneys for appellant
Andrew Berrada
200 Garden City Plaza
Garden City, New York 11530
(516) 248-4300

MARC A. ROSENBERG,
Of Counsel.

Recd 8/6/76
E. Cohen

THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN. N.Y.